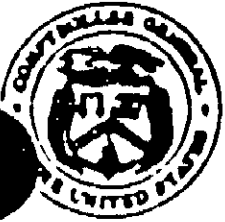


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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: John Eastman
File: B-246538.2
Date: January 27, 1993

DIGEST

A Special Assistant to a member of the Civil Rights Commission, who was employed in California for about 2-1/2 months on an intermittent basis claims relocation benefits for his move to Washington, D.C., incident to receiving an appointment to a full-time position. The claim is denied since, in any event, no travel orders were issued incident to his Washington appointment evidencing that he was being transferred in the interest of the government, and the agency subsequently has declined to do so.

DECISION

A representative of the United States Commission on Civil Rights has requested review of our Claims Group's settlement¹ approving payment of relocation expenses for Mr. John Eastman incident to his 1987 move from an intermittent position in California to a full-time position in Washington, D.C. For the reasons stated below, we conclude that the record does not establish Mr. Eastman's eligibility for those benefits, and therefore the Claims Group's settlement is reversed.

BACKGROUND

The Civil Rights Commission is composed of eight members. 42 U.S.C. § 1975(b) (1988). Commissioners who are otherwise employed by the federal government serve on the Commission without additional compensation, but receive actual travel expenses and per diem when away from their usual place of residence, in accordance with 5 U.S.C. Chapter 57, Subchapter I. 42 U.S.C. § 1975b(b). Commissioners who are not otherwise employed by the federal government are paid only for each day spent in the work of the Commission, 42 U.S.C. § 1975b(a). The Commission also is authorized a full-time staff director and is authorized, within the limitation of its appropriations, to appoint such other personnel as it deems advisable, and may procure services as authorized by 5 U.S.C. § 3109. See 42 U.S.C. § 1975d(a).

The Commission's annual appropriation acts have limited the time for which the Commissioners and some of their staff may be compensated. During the time in question here (1987-1989), the appropriation acts authorized "one special assistant for each Commissioner whose compensation shall not exceed the equivalent of 150 billable days at the daily rate of a level 11 salary under the General Schedule."²

The record indicates that on June 23, 1987, Mr. Eastman received an appointment as Special Assistant to a Commissioner who resided in California. The Commission established this position under Schedule C (excepted service) of the civil service regulations, and classified the position as intermittent with permanent tenure at grade GS-11. Mr. Eastman held this position in California until September 9, 1987, when he was appointed the Commission's Public Affairs Officer, a permanent, full-time position in Washington, D.C., also established under Schedule C. Effective September 29, 1989, he was reappointed to an intermittent position in California as Special Assistant to a Commissioner. Three months later, on December 31, 1989, the Commission terminated Mr. Eastman's employment.

At issue in this case is whether Mr. Eastman is entitled to relocation benefits he claims for his 1987 move from Los Angeles to Washington, D.C., incident to his appointment to the Public Affairs Officer position.

The Commission did not issue travel orders to Mr. Eastman for his 1987 move to Washington indicating that the move was in the interest of the government and not primarily for Mr. Eastman's convenience or benefit and authorizing relocation allowances. In 1989 he made claim to the agency for such allowances, and the record includes a December 22, 1989 letter, prepared at Mr. Eastman's request, to the Commission's Acting Staff Director from Ms. Susan Prado, who had been the Acting Staff Director at the time of his 1987 move, summarizing the events surrounding that move. (At the time Ms. Prado's letter was written, she was no longer with the Commission.)

Ms. Prado states that she told Mr. Eastman at the time he was offered the Public Affairs position that he would receive relocation benefits if the Commission's regulations allowed them. Subsequently, she states, the Commission's Deputy Staff Director informed her that it was unlikely that the Commission would provide relocation benefits, and she so

²Title V, Pub. L. 99-500, 100 Stat. 1783-66, Oct. 18, 1986; Title V, Pub. L. 100-459, approved Oct. 1, 1988, and Title V, Pub. L. 101-162, 103 Stat. 1019, approved Nov. 21, 1989, respectively.

informed Mr. Eastman. Ms. Prado adds that she had determined at the time of the change of positions that Mr. Eastman's transfer was in the interest of the government but that she did not provide written authorization of relocation expenses or document this determination because of the advice she had received from the Deputy Staff Director.

After reviewing the circumstances of Mr. Eastman's move, including information provided in a memorandum from the Chief of the Budget and Finance Division and Ms. Prado's letter, the Acting Staff Director determined that it was "not in the best interest of the Government to retroactively authorize" reimbursement of the expense of Mr. Eastman's move to Washington, and by letter of January 31, 1990, he disallowed Mr. Eastman's claim. Mr. Eastman appealed the disallowance to our Claims Group. As noted above, the Claims Group issued a settlement allowing payment, which in essence was based on a determination that Mr. Eastman was an "employee" within the meaning of the statute authorizing the allowances, that he transferred, and therefore, that he is entitled to the relocation allowances.

OPINION

Relocation allowances are payable, under prescribed regulations "when the head of the agency concerned or his designee authorizes or approves", to employees "transferred in the interest of the government from one official duty station to another for permanent duty." 5 U.S.C. §§ 5724(a) and 5724a (1988). Such expenses are not payable for transfers primarily for the convenience or benefit of the employee, or at his request. § 5724(h). Furthermore, agencies must require transferring employees to sign an agreement to remain in the government service for 12 months after the transfer, and employees who violate this agreement must repay the expenses paid by the agency unless the employee separates from the federal service for reasons beyond the employee's control that are acceptable to the agency. § 5724(i).

As noted above, Mr. Eastman's appointment in California in 1987 was to an intermittent position. Intermittent employees are a distinct class of federal employees to be used when the "nature of their work is sporadic and unpredictable." Federal Personnel Manual (FPM) Chapter

¹Intermittent employees are not eligible for many of the benefits available to other federal employees. For example, intermittent employees do not accrue annual leave and are not eligible for health or life insurance or retirement

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340, para. 4-1b, April 3, 1985. By definition, they work "without a regularly scheduled tour of duty". 5 C.F.R. § 340.402. In practice, an intermittent employee may work any number of consecutive days and then not work for weeks or months.

The applicable statutes and the Federal Travel Regulations do not directly address the question of whether a person serving in the type of intermittent position Mr. Eastman occupied in California may be granted relocation benefits incident to a change of duty stations.¹ However, we need not decide that issue in this case since in any event Mr. Eastman is not entitled to relocation benefits for his 1987 move without the authorization or approval of the transfer by the "head of the agency" or "his designee" as being "in the interest of the government" and not primarily for the convenience or benefit of the employee. 5 U.S.C. § 5724(a) and (h), supra. Such determinations are matters within the discretion of the employing agency, and we will not overturn an agency's determination unless it is arbitrary, capricious or clearly erroneous under the facts of the case. Julia R. Lovorn, 67 Comp. Gen. 392 (1988), and cases cited therein.²

¹(...continued)

benefits. See FPM Chapter 340, para. 4-3, April 3, 1985; see also, Anderson v. United States, 5 Ct Cl. 573, 580 (1984), aff'd 764 F.2d 849 (1985).

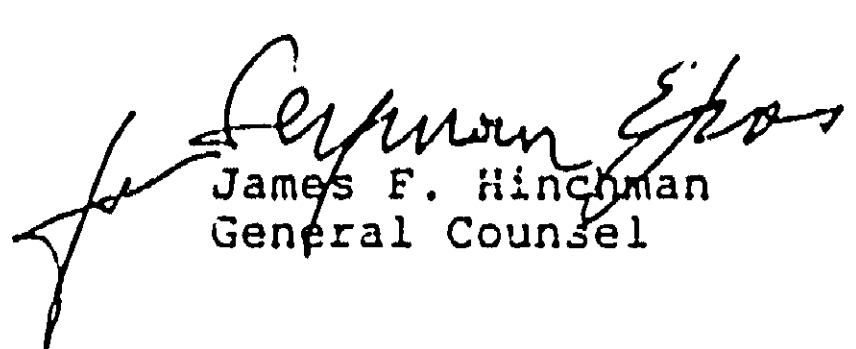
⁴We have held that a person appointed as an intermittent expert or consultant was not eligible for relocation benefits incident to his appointment to a permanent position at a different location. B-179596, Feb. 21, 1974. The rationale for that decision reflects the unique status of experts and consultants, who are allowed travel and transportation expenses while away from home or regular place of business and at the place of employment or service, under a special statute applicable only to experts and consultants. See 5 U.S.C. § 5703. We reasoned that the employee's home or regular place of business was not his official duty station for the purpose of a transfer "from one official duty station to another" as section 5724 requires. However, Mr. Eastman was not hired as an expert or consultant and thus it appears the case described above is not applicable to his case.

⁵We have overturned an agency's denial of relocation expenses where the agency issued an announcement for the position under its merit promotion program and the employee applied for and received the appointment on that basis. See Eugene R. Platt, 59 Comp. Gen. 699 (1980). Mr. Eastman's

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In this case, the agency did not issue travel orders or otherwise authorize reimbursement of relocation expenses incident to the 1987 move. Also, at that time the agency made no formal determination that the transfer was in the interest of the government and not primarily for the convenience or benefit of the employee. While Ms. Prado, who was then the acting Staff Director, indicates that she considered Mr. Eastman's move to be in the interest of the government, she did not authorize relocation benefits because she was advised the agency would not provide them. Thus, such benefits were not authorized for Mr. Eastman's move at that time and the subsequent Acting Staff Director has determined it is not in the government's interest to approve them retroactively, and on that basis he denied Mr. Eastman's claim. In making his determination, the Acting Staff Director reviewed the record, including a memorandum from the Chief of the Budget and Finance Division detailing the circumstances surrounding Mr. Eastman's claims and Ms. Prado's letter, discussed above. In the circumstances of this case, we have no reason to overturn the agency's determination on this matter.

Accordingly, the Claims Group's settlement allowing Mr. Eastman's claim for relocation benefits incident to his 1987 move from Los Angeles to Washington, D.C., is overruled, and the agency's disallowance is sustained.


James F. Hinchman
General Counsel

³ (...continued)
appointment, however, was not under the merit promotion program.